No. 7887

In the United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,
Appellee and Cross-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF CROSS-APPELLANT

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ARGUMENT

The sole question remaining for decision after reading the brief of cross-appellee, is whether the 8% statute is applicable. If it is, it is admitted that the court may add interest at that rate to the verdict, and it is not seriously questioned that it may add interest at the proper rate on the constituent items of $5300.34

from July 1, 1926, to date of judgment, and on the sum of $3982.29 from January 1, 1927, to date of judgment. It is argued, however:

1. That Rem. Rev. Stat. 5841 fixing interest at 8% has been repealed by implication by the 1911 Public Service Commission Law (Cross-App. br. p. 12).

2. If not repealed, the statute is penal and in derogation of the common law, and should be strictly construed and not here applied (ibid. 4).

3. In any event, the Northern Pacific's unpublished scaling rule is binding, or the commercial scaling rule, which is unpublished, is not binding, and is not a part of tariff 51 (ibid. 4).

The first two points are scarcely argued, and need not detain us long.

1. It would have been an easy matter for the legislature when it passed the Public Service Commission Law in 1911, to have expressly repealed the 8% interest statute along with other statutes which it repealed expressly (Laws of '11, §109, p. 611). Furthermore, §§111 and 112 of that act treated the 1911 Act not as a new enactment, but as a continuation of the earlier statutes. Section 112 provided:

> "This Act, in so far as it embraces the same subject-matter, shall be construed as a continuation of Chapter 81 of the Laws of 1905, and the Acts amendatory thereof and supplemental thereto. . ."

Furthermore, the Public Service Commission law was amended in 1913, 1915, 1919, 1921, 1923, 1927, 1929 and 1933 as appears from the references thereto in Rem. Rev. Stat. 10339 to 10459. And yet the legislature has not seen fit to repeal the foregoing 8% interest statute. Furthermore, every code that has been published since 1911 has expressly made the foregoing 8% interest statute a part thereof, as part of the existing statutory law of the State of Washington (Rem. Code §5305; Rem. & Bal. Code §5305; Rem. Comp. Stat. §5841; Rem. Rev. Stat. §5841). Despite the fact that each of these codes has been adopted as the official code of the State of Washington by the legislature, no amendment or repeal of the 8% statute has ever been effected. In face of this continuous legislative history of the matter, it can scarcely be claimed that Rem. Rev. Stat. 5841 has been repealed by implication.

2. The carrier contends that the foregoing statute is, however, penal and in derogation of the common law and should be strictly construed. Strict construction, however, does not mean that the intention of the legislature is to be disregarded. If the legislature's intent can be ascertained, strict construction will not prevent giving effect to that intention.

See

59 C. J. 1117,

Shorts v. Seattle, 95 Wash. 531, 164 Pac. 239.

The intent of the statute has heretofore been argued

in cross-appellant's brief on the question of what is meant by price rate or tariff required to be published, and need not here be repeated.

3. The carrier's most serious contention is that the Northern Pacific's unpublished scaling rule is binding and need not be filed, or alternatively, that the unpublished scaling rule of the commercial scale is not binding, and that for either or both of the foregoing reasons the 8% statute does not apply.

That an unpublished scaling rule is not binding, see Appellee's Brief, page 110. In passing, it should be pointed out that the case of *Pennsylvania Railroad Co. v. Puritan Coal Co.*, 237 U. S. 121, cited in cross-appellee's brief page 6, as a case in which a carrier was held liable for damages for disregarding its own unpublished car service rules, was a case in which the rule was not attacked, and the action was for breach of the carrier's common law duty. The Interstate Commerce Commission cases cited on the same page have been shown not to be in point in appellee's brief, page 110.

Nor can it be contended that the commercial scaling rule not being published is not binding. That rule was published, because the carrier published its rate in terms of board measure, a trade term meaning board measure commercial scale. The jury having found for the shipper, the carrier is concluded by that verdict and cannot now reopen the question as to what

board measure means. We again refer to cross-appellant's brief stating our reasons for believing the statute applicable, and again reiterate what was there pointed out, page 22, that the carrier having published its rate in terms of board measure, and the jury having found for the plaintiff, it necessarily follows that the carrier charged a rate in excess of its published tariff and therefore comes within the 8% statute. (Compare brief of cross-appellee, p. 5).

While the carrier does not seriously question the right of the court to add interest from each of the constituent cut off periods in determining the amount on which and the times from which the interest should be calculated, it selects a sentence from cross-appellant's brief, page 24, without quoting the earlier portion of the paragraph in connection with which it must be construed. All that was meant was that since the jury disbelieved testimony offered on behalf of the defendant on the question of lost, stolen and broken logs by finding for the full amount claimed by the shipper, and since the testimony was undisputed as to when the overcharges were exacted, on the theory that there was no lost, stolen, or broken logs that affected the scale, the court should not only have added interest on the basis of 6%, but should have applied the basis of 8%.

The interest doesn't run under the statute (R.R.S. 10350) from the date of protest or demand for repayment. It runs, according to R.R.S. 10433, "from

the date of collection" of the overcharge. The Department on this question follows the statute, for it requires the payment of interest "from date of collection" (Tr. 93).

Campbell River Mills case, 53 Fed. (2d) 69, (Cr.-App. br. p. 10), is cited as inferential authority for its view that the 6% statute should govern because in that case the reparation bore 6% interest. But the question of interest was not raised in that case, and no inference one way or the other can be claimed as to the propriety of the interest charged. It will hardly be contended that a case which does not decide a question and one in which the question is not even raised, is authority for a proposition direct or indirect.

See

Duff v. Fisher, 15 Cal. 375;
Elfring v. New Birdsall Co., 96 N. W. (S.D.) 703;
New v. Oklahoma, 195 U. S. 252, 25 S. Ct. 68, 49 L. Ed. 182.

While there is, therefore, no direct authority one way or the other, it is submitted that a reasonable interpretation of the 8% interest statute requires its application in this case.

Respectfully submitted,

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